Supreme Court, U.S.
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NO. 93-7162

IN THE

# Supreme Court of the United States

OCTOBER TERM 1994

**JIM EDMOND**

*PETITIONER,*

**V.**

**NEWMAN WHITNEY, A DIVISION OF NEWMAN MACHINE COMPANY, INC. AND MEMPHIS MACHINERY AND SUPPLY CO., INC.**

*RESPONDENTS.*

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

# PETITION FOR WRIT OF CERTIORARI

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28pp

## QUESTION PRESENTED FOR REVIEW

I. WHETHER THE COURT OF APPEALS PROPERLY APPLIED MISSISSIPPI LAW IN DETERMINING THAT THE PETITIONER, JIM EDMOND, FAILED TO PROVE THAT HIS INJURY WAS CAUSED BY A DEFECT IN THE DESIGN OR MANUFACTURE OF THE MACHINE WHICH IS THE SUBJECT OF THIS ACTION?

## LIST OF PARTIES

In addition to petitioner Jim Edmond, the only other parties to the appeal before the United States Court of Appeals for the Fifth Circuit, whose judgment is sought to be reviewed, were Newman Whitney, a division of Newman Machine Company, Inc. and Memphis Machinery and Supply Co., Inc. as appellees.

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Petitioner Jim Edmond respectfully requests that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered on August 5, 1994, which affirmed the judgment for the respondents previously entered in the United States District Court for the Northern District of Mississippi.

## OPINION BELOW

Judgment was entered in this cause for the respondents on December 8, 1992, by the United States District Court for the Northern District of Mississippi, the Honorable Glen Davidson, United States District Judge, in cause number EC 89-321D-D. Subsequently, this decision was affirmed by the United States Court of Appeals for the Fifth Circuit on August 5, 1994, in cause number 93-7162. The petition for rehearing was entered by the Court of Appeals on September 7, 1994. The order affirming the judgment of the United States District Court for the Northern District of Mississippi is included in the appendix. The orders granting the respondents judgment as a matter of law from the United States District Court for the Northern District of Mississippi are also included in the appendix.

## STATEMENT OF JURISDICTION

The petitioner seeks review of the final decision of the United States Court of Appeals for the Fifth Circuit entered in this action on August 5, 1994. A judgment denying the petition for rehearing was entered on September 7, 1994. This Court has jurisdiction to review this decision pursuant to 28 U.S.C. 2101.

## STATEMENT OF THE CASE

In 1989, the petitioner, Jim Edmond ("Edmond") filed a product liability action against the Respondents. After a trial in district court, the Court ruled, as a matter of law pursuant to FRCP 50, that the motion should be granted on the ground that the danger was open and obvious, and therefore recovery was barred.

The decisions were appealed to the Court of Appeals for the Fifth Circuit, where the judgment was affirmed on the grounds that Edmond's failure to adduce any competent evidence that his injury was proximately caused by a defect in the design or manufacture of the machine on which his injury was sustained doomed his ability to recover. An order denying Edmond's petition for rehearing was entered by the Court of Appeals on September 7, 1994.

Edmond asserts that the Court of Appeals has decided a question in conflict with the decision of the Mississippi Supreme Court, the Court of last resort in that jurisdiction. This is pertinent because the jurisdiction of the district court was invoked pursuant to 28 U.S.C. 1332, and being a diversity case, the Court was Erie bound to apply state law.

## REASONS FOR GRANTING THE WRIT

### I.

### THE FIFTH CIRCUIT COURT OF APPEALS HAS INTERPRETED THE LAW OF STRICT LIABILITY IN A MANNER THAT CONTRAVENES IT'S OWN TEACHINGS IN SATCHER AND THAT CONFLICTS WITH ITS OWN APPROACH IN CONSTRUING THE DECISION IN SATCHER

The Court of Appeals ruled that Edmond has failed to meet his burden of proving that his injury was proximately caused by a defect in the machine. The burden on Edmond, in a strict liability context, is to prove that the machine was unreasonably dangerous and that the defective condition made it unreasonably dangerous to him. **Satcher v. Honda Motor Co.,** 758 F. Supp. 393, 396 (S.D. Miss. 1991), **reversed and rendered,** 984 F. 2d 135 (5th Cir. 1991), **opinion vacated and case remanded,** 993 F. 2d 56 (5th Cir. 1993). Edmond met this burden.

Edmond did present sufficient evidence to present a jury issue as to the defective condition of the machine. The testimony of Dr. Bouchillion outlined defects in the machine from which a reasonable person could find negligence. Dr. Bouchillion testified that there were seven (7) design criticisms or defects in the machine. These defects were:

1. the doors covering the gears should be self closing to prevent human error (SR. 1,p.107);
2. in the alternative, an interlocking switch should have been included in the design to stop the gears when the doors were open (SR. 2, p. 129);
3. alternatively, there should be a color coding scheme to warn of danger (SR. 2, p.129);
4. the hinge that holds that door is sprung (SR. 2, p.129);
5. the door must be opened to apply oil (SR.2, 130);
6. the doors must be opened to grease the machine (SR. 2, p.131);
7. there were no warning signs to inform a user of danger (SR.2, p.131).

II

## THE FIFTH CIRCUIT COURT OF APEALS' DECISION IS IN DIRECT CONFLICT WITH THE DECISIONS OF THE MISSISSIPPI SUPREME COURT AND WITH MISSISSIPPI LAW

The trial court improperly applied Mississippi law when it held that the open and obvious defense is a complete and absolute bar in a products liability case. (SR. 6, p.806-07). In reaching this conclusion, the trial court relied upon **Batts v. Tow-Motor Forklift Co.,** 978 F. 2d 1386 (5th Cir. 1992) and **Toney v. Kawasaki Heavy Industries,** 975 F. 2d 162 (5th Cir. 1992).

The Court of Appeals for the Fifth Circuit has recognized that Mississippi applies a risk utility analysis in product liability cases and has done so since 1987. **Satcher v. Honda Motor Co.,** 993 F. 2d. 56, 57 (5th Cir. 1993), **citing, Sperry-New Holland v. Prestage,** 617 So. 2d 248 (Miss. 1993). That Court acknowledged that it had been applying an erroneous interpretation of Mississippi law in product liability cases, and that cases of this nature should be remanded to the trial court to apply the newly developed law to the case. **Satcher,** at 993 F. 2d 57-58.

However, on appeal to the Court of Appeals, rather than addressing this issue, it held that Edmond had failed to testify as to how the accident happened, thus precluding recovery. This is simply not the law in Mississippi.

This case was tried on, inter alia, a strict liability theory. In Mississippi, liability is imposed if the product left the hands of the seller in a defective condition unreasonably dangerous to the user or consumer and such defect causes harm to the consumer provided the product reaches the user without substantial change in the condition in which it is sold. **Edwards v. Sears, Roebuck and Co.,** 512 F. 2d 276, 288 (5th Cir. 1975); **State Stove Mfg. Co. v. Hodges,** 189 So. 2d 113 (Miss. 1966), **cert. denied**, 386 U S 912 (1967).

The decision of the Court of Appeals is in direct conflict with decisions of the Mississippi Supreme Court, mandating the intervention of this Court, because this decision, in contravention of **Erie**, is an unacceptable departure from the usual course of judicial proceedings.

## CONCLUSION

The Court of Appeals and the District Court have shown an inability to properly interpret and apply Mississippi Law in a case upon which jurisdiction is founded in diversity of citizenship. This error is a dramatic departure from accepted procedure, and is a direct affront to Erie. This Court should grant the petition for writ of certiorari.

Dated: 12-6-94

Respectfully submitted,

Bennie L. Jones, Jr.

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UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 93-7162

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D.C. Docket No. CA 89 321 D D

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**JIM EDMOND,**

*Plaintiff-Appellant,*

**versus**

**NEWMAN WHITNEY, ETC., ET AL.,**

*Defendant,*

**NEWMAN WHITNEY, ETC., and**
**MEMPHIS MACHINERY AND SUPPLY CO., INC.,**
*Defendants-Appellees.*

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Appeal from the United States District Court for the
Northern District of Mississippi

**Before:**

WIENER, EMILIO M. GARZA and
BENAVIDES, Circuit Judges.

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**JUDGMENT:**

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the district court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

August 5, 1994

ISSUED AS MANDATE: SEPT 19, 1994
Clerk, U. S. Court of Appeals
Fifth Court
By: (t.j.t.)
Deputy
S/CHARLES FULBRUGE III
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7162

JIM EDMOND,

*Plaintiff-Appellant,*

versus

NEWMAN WHITNEY, ETC., ET AL.

*Defendant,*

NEWMAN WHITNEY, ETC., ET AL, DEFENDANT
NEWMAN WHITNEY, ETC. AND MEMPHIS
MACHINERY AND SUPPLY CO., INC.,

*Defendants-Appellees.*

Appeal from the United States District Court
for the Northern District of Mississippi

CA 89-321-D-D

Before WIENER, EMILIO M. GARZA
and BENAVIDES, Circuit Judges.

PER CURIAM:*

Having considered the briefs submitted by able counsel for the respective parties to this litigation, reviewed the record, and listened to oral argument of counsel, we are convinced that the district court's grants of judgments as a matter of law for

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expenses on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Defendants-Appellees are free of reversible error. Irrespective of the reasons assigned by the district court, we conclude that Plaintiff-Appellant Edmond's inability to adduce any competent evidence that his injury was proximately caused by a defect in the design or manufacture of the machine in which his injury was sustained doomed his ability to recover. Edmond did not, presumably because he could not, testify as to the proximate cause of his accident; and the evidence he adduced-including, without limitation, his experts' testimony - did nothing to supply the necessary nexus between a defect in the machine and the proximate cause of the injury.

Absent that, Edmond simply failed to meet his burden of proof. We are constrained, therefore, to conclude that the judgments as a matter of law rendered by the district court should be and therefore are.

AFFIRMED
S/CHARLES R. FULBRUGE III
CLERK

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF MISSISSIPPI**
**EASTERN DIVISION**

JIM EDMOND,

*Plaintiff,*

No. 1:89CV321-D-D

v.

NEWMAN WHITNEY, Division of Newman Machine Company, Inc., and MEMPHIS MACHINERY AND SUPPLY CO.,

*Defendants.*

## FINAL JUDGMENT AND ORDER GRANTING MOTIONS FOR JUDGMENT AS A MATTER OF LAW

This cause having come on for trial upon the Complaint of the plaintiff and the Answer of the defendant, and after a jury of eight persons having been empaneled to try the issues, and the court, after hearing the plaintiff's evidence, and receiving a motion for judgment as a matter of law pursuant to Rule 50(a), Fed. R. Civ.P., from both defendants, granted the motion for judgment as a matter of law as to defendant, Memphis Machinery and Supply Co., Inc., and initially overruled the motion of Newman Whitney, Division of Newman Machine Company, Inc., at the end of the plaintiff's case. After hearing the evidence of Newman Whitney and receiving a renewed motion for judgment as a matter of law from said defendant at the conclusion of all of

the proof, the court finds that said motion is well taken and that judgment as a matter of law should be granted in favor of the defendants, it is

ORDERED:

That the motions of Newman Whitney, Division of Newman Machine Company, Inc., and Memphis Machinery and Supply Co., Inc., for judgment as a matter of law be, and the same hereby are SUSTAINED, and the complaint in this cause is finally DISMISSED with prejudice.

This 8th day of December, 1992.

(g.h.d.)
United States District Judge

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF MISSISSIPPI**
**EASTERN DIVISION**

JIM EDMOND
LIBERTY MUTUAL INSURANCE

*Plaintiff*
*Intervenor*

vs.

Civil Action No. EC 89-321-D-D

NEWMAN WHITNEY, a Division of
Newman Machine Co., Et Al.

*Defendants*

**ORDER OVERRULING MOTION FOR NEW TRIAL**

The plaintiff has filed his motion for a new trial pursuant to Federal Rule of Civil Procedure 59 in the case sub judice. This court entered judgment as a matter of law in favor of the defendant Memphis Machinery Company at the conclusion of the presentation of the plaintiff's case. The court further entered judgment as a matter of law in favor of the defendant Newman Whitney at the conclusion of all of the evidence in the case. As discussed thoroughly in the trial record, this court is of the opinion that the danger inherent in the S370 planer was open and obvious to the plaintiff in this case. Pursuant to the authority cited in the trial record from both the Mississippi Supreme Court and the United States Court of Appeals for the Fifth Circuit, this court is of the opinion that the aforementioned judgments were properly granted.

Accordingly, the motion for a new trial in the case sub judice is not well taken the same is hereby denied.

ORDERED and ADJUDGED this 3 day of February, 1993.

(g.h.d.)
United States District Judge

S/NORMAN GILLESPIE,
CLERK
S/by Debi Houston
Deputy Clerk

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

---

**No. 93-7162**

---

JIM EDMOND,

*Plaintiff-Appellant,*

versus

NEWMAN WHITNEY, Etc.,
ET AL.,

*Defendant,*

NEWMAN WHITNEY, Etc. and
MEMPHIS MACHINERY AND SUPPLY CO., INC.,

*Defendants-Appellees.*

---

Appeal from the United States District Court for the
Northern District of Mississippi

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**ON PETITION FOR REHEARING**
(SEPTEMBER 7, 1994)
Before WIENER, EMILIO M. GARZA
and BENAVIDES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied. 9/2/94

ENTERED FOR THE COURT:

(F.P.B.)
Fortunato P. Benavides
United States Circuit Judge
S/CHARLES R. FULBRUGE III
CLERK

some of these cases.

Let me have the Exhibit P-38, Mrs. Ellixson.

THE CLERK: Mr. Harmon has it. If you'll return it.

MR. HARMON: By all means.

THE COURT: All right. Gentlemen, we're doing a lot of recessing today.

But Joe, if you'll tell the jury to go on, they can get coffee, whatnot. Be back in the jury room at 20 after ten.

THE MARSHAL: Okay.

THE COURT: We'll be in recess until 20 past ten.

(Recess.)

(Jury absent.)

THE COURT: At the close of the plaintiff's case, the defendants' motion for judgment as a matter of law comes before the court for the court's consideration and ruling.

Of Course, the court must adhere to the pronouncements of the Fifth Circuit Court of Appeals in the seminal case of Boeing Company v. Shipman, 411 F.2d 365 (1969). "The court must view all of the evidence that has been introduced to this point in the case in a light and with all reasonable inferences most favorable to the plaintiff.

If, upon consideration of all of the evidence, facts, and inferences, the evidence points so strongly and overwhelmingly.

In favor of one party that the court believes that reasonable men could not arrive at a contrary verdict, the motion for directed verdict should be granted. On the other hand if, there is evidence of such quality and weight that reasonable and fair-minded jurors in the exercise of an impartial judgment might reach different conclusions, the motion for directed verdict should be denied."

In the case sub judice, of course, the cases of Melton v. Deere and the Batts case have been cited to the court, precedent; also the Edwards v. Sears, Roebuck cases concerning the theory of res ipsa loquitur.

The crux of the defendants' argument at this point is that the danger in this particular piece of machinery was open and obvious to the plaintiff and to any user of the machine and to any casual observer.

Also, the defendant Memphis Machine and Supply Company moves for judgment as a matter of law, distinguishing its position from the position of the Coca-Cola BottlingCompany of Vicksburg in the

Mississippi Supreme Court case of Coca-Cola Bottling Company v. Reeves.

The court will initially address the position of the Memphis Machine and Supply Company as a defendant in the case. Of course, counsel for Memphis cites the Shainberg, the old Shainberg case in Mississippi, holding that a retailer is not liable for what is shipped to it in a package. The Reeves case, on page 380 — the citation for the case is 486 So.2d, page 374 (Mississippi, 1986).

On Page 380, specifically, the Mississippi Supreme Court states: "Vicksburg Coke's own experience explains how it acquires and examines the Coke carton — Vicksburg Coke's own evidence explains how it acquires and examines the Coke cartons before using them, replacing filled Coke bottles in them. Vicksburg Coke, therefore, had far greater occasion to inspect the Coke carton than did the defendant in Shainberg, the shoes there in issue. Likewise, the consuming public and others lawfully on the premises would have no reason to rely for the safety of the carton upon anyone other than the original seller of the Coke, Vicksburg Coke. The point precisely is that the customer or bystander may reasonably be expected, under the facts of this case, to rely solely upon Vicksburg Coke. The contradiction in the Shainberg case proceeds upon the assumption that a reasonable consumer would rely upon the manufacturer of the shoes to the exclusion of the retail seller."

In the case sub judice, the Court notes from the exhibits that the machine very prominently has the name "Whitney" exhibited on two large plates that are displayed prominently on the machine. There is a small plate, I believe, that says "Memphis Machine and Supply Company, "very small plate on the side of the machine. But, in any event, there is no evidence in this record that Memphis Machine ever took possession of this machine, ever in any way inspected the machine, or that there was any reliance whatsoever by Airline Manufacturing Company on any representation made by Memphis Machinery Company. Exhibit P-38, to the contrary, indicates that Airline Machine Company picked up the piece of equipment from Baxter D. Whitney and Sons.

Accordingly, applying the Boeing v. Shipman test to the defendant Memphis Machinery and Supply Company, the court is of the opinion that the motion for judgment as a matter of law is well-taken. The same is hereby sustained.

Now, as to the remaining defendants in the case, Newman Whitney, a division of Newman Machine Company, et al., this court acknowledges that there is great validity to the argument made by Mr. Rood that the proof to this juncture is that any danger in this machine is open and obvious. However, the court, which decided the case — Melton v. Deere was my case. I'm the judge who granted the directed verdict. It was affirmed in the Fifth Circuit, 837 F.2d, page 1241 (Fifth Circuit, 1989).

And also the Batts v. Caterpillar Company was a case tried in this court. Taking the logic and the reasoning in the Batts case, which very — well. really, Judge Barksdale in essence approved essentially everything that was done in the trial court in the Batts case. I, in that case, felt that it was a question for the jury as to whether the condition of this machine was an open and obvious danger.

Like wise, in the Melton v. Deere case, since reflection on this case over a period of a couple of years, the dissenting opinion in this case written by Judge Reavley, in the opinion of the court, is a very logical discussion of the open and obvious defense in a products liability case in Mississippi.

Being guided by the Boeing v. Shipman test, taking all inferences in the light most favorable to the plaintiff, the court is of the opinion that the motion for judgment as a matter of law at the conclusion of the plaintiff's case is not well-taken insofar as the same pertains to the defendant Newman Whitney, a Division of Newman Machinery Company. The motion is overruled as to that defendant.

The court specifically notes that there is no claim in this case, no viable claim in this case,for punitive damages. If the pretrial order reflects any such claim, the same is hereby denied and overruled, and judgment as a matter of law as to any claim for punitive damages is granted.

All right. That's the ruling of the court. Now, what's the position of Newman Machine? Do you need a little time to see about your witnesses?

MR. NICHOLS: Your Honor, we — as we left yesterday, and in the course of previous discussion with the

Secondly, as far as compliance with the standards, the evaluation, design evaluation, we'd submit to the court that under the Hobart case that any evaluation by the

plaintiff's experts should be excluded as was Dr. Carley's testimony in that case, because their evaluation of the machine was done in the abstract, in a vacuum, and did not consider all the factors involved. The only credible expert testimony was that it complied with not only industry standards, but the voluntary ANSI standard that was applicable.

Thank you, Your Honor.

THE COURT: All right. Gentlemen, I'm going to take about a 15-minute break here to look over the cases you cited, and try to come back in with a ruling in 15 minutes.

(Recess)

(Jury absent.)

THE COURT: The Court has before it the defendants' motion for judgment as a matter of law at the conclusion of all the evidence in the case.

This court in addressing subject motion is bound by the pronouncements of the Fifth Circuit Court of Appeals in the seminal case of Boeing Company v. Shipman, 411 F.2d at page 365, (Fifth Circuit, 1969).

The customary and familiar standards in which the court must view the evidence and the motion at this juncture provide that: If upon consideration of all of the evidence, the facts and inferences point so strongly and overwhelmingly in favor of one party that the court believes that reasonable jurors could not arrive at a contrary verdict, the motion should be granted. On the other hand, if there is evidence or such quality and weight that reasonable and fair-minded jurors in the exercise of impartial judgment might reach different conclusions, the motion should be denied.

The court must look at the evidence and all inferences in a light most favorable to the party opposed to the motion. By the same token, a mere scintilla of evidence is insufficient to present a question for the jury.

The case sub judice, of course, is a products liability case, where the plaintiff maintains an actionagainst the defendants alleging strict liability in tort, negligent design, and a negligent failure to warn. The court is obligated to follow the pronouncements of the Fifth Circuit Court of Appeals in similar cases.

There is no question that the most recent pronouncements are the case of Batts v. Caterpillar Company, 91-1511, decided within the last two weeks or ten days, dated November the 25th, 1992, and the case of Toney v. Kawasaki Company, 975 F.2d at page 162, (Fifth Circuit, 1992), which firmly establish the defense of open and obvious nature of any defect as a complete and an absolute bar in a products liability case. Now, these two cases were decided subsequent to this court's ruling in the case of Melton v. Deere, 887 F.2d at page 1241. I might add, when this court granted a directed verdict for the defendant in Melton v. Deere, that the cases that existed at that time and provided guidance for the court were the cases of Gray v. Manitowoc, 771 F.2d at page 866 (Fifth Circuit, 1985), and the District Court case of Hedgpeth v. the Fruehauf Company, 634 F.Supp. at page 93. That case was a District Court opinion written by Judge Tom S. Lee in 1986.

Now, subsequent to the Melton case, the Fifth Circuit addressed the open and obvious issue in Melton, and then these cases of Batts, which was also tried in this court, Batts v. Caterpillar, and Toney v. Kawasaki, have been decided. The Fifth Circuit in Footnote 2 on page 166 in the Toney v. Kawasaki case states, "It is clear, however, that whether a product presents an open and obvious danger barring recovery is in the first instance a question of law to be addressed by the Court," citing Melton v. Deere, and also citing Harrist v. Spencer-Harris Tool Company, 244 Miss. 84, 140 So. 2d, page 558 (Mississippi, 1962). "If as a matter of law the danger is open and obvious, it follows that the product is not unreasonably dangerous under Mississippi consumer expectation standards."

In the case sub judice, the court, in reviewing the evidence, is of the opinion that there is not one scintilla evidence that the danger in this case is latent, concealed, hidden. It's this court's recollection that all of the witnesses, both for the plaintiff and the defendant, acknowledged that these gears present an open and obvious danger when that door is open to this machine.

In the case sub judice, we also of the problem of causation proof on the part of the plaintiff. In that regard in this court's opinion, the factual situation is very similar to that addressed in the cases of Edwards v. Sears, Roebuck and Jordan v. Kelly-Springfield Company.

The court is of the opinion that the open and obvious nature of a defect or danger is a complete bar in a products liability case. In this case we are not so much concerned with the casual observer as we are with the customary user of the machine. The plaintiff was employed by the Airline Manufacturing factory for some years. He had worked near this machine for several years prior to the accident.

The court notes that there has been no proof as to how the precise injury occurred. In that regard, it's similar to these res ipsa loquitur cases. The court notes that the machine was in the factory some 27 years with out incident. There was no accident or incident involving this machine for that period of time. The court is of the opinion that there is no jury issue as to whether the danger relating to these gears and coming in contact with these gears was hidden or concealed. Accordingly, the court is of the opinion that the motion for judgment as a matter of law is well-taken. The same is hereby sustained.

All right. Mr. Marshal, see if the jury is here, please sir.

Let's keep our seats until the jury comes in, please. We will recess.

THE MARSHAL: Your Honor —

THE COURT: Yes, sir.

THE MARSHAL: — we have one juror that hasn't made it back yet.

THE COURT: Very well. We're a little early. We'll just keep our seats.

(Pause)

THE MARSHAL: They're all back.

THE COURT: All right. Let's have the jury please, sir.

(Jury in.)

THE COURT: All right. Ladies and gentlemen of the jury, when we recessed, the court told you that all of the proof in this case had been presented to you. Then after you were released on the recess, the defendants made a motion for judgment as a matter of law at the conclusion of all of the proof. I have sustained that motion. In effect, what I have ruled is that any defect or danger relating to this machine was open and obvious, it was open and obvious danger.

(Pause)

THE COURT: Must be some repair going on in this building.

In any event, the law in the circuit, ladies and gentlemen of the jury, is that if there's a danger that is not hidden, concealed, or latent, and it's an open and obvious danger, that's a bar to recovery in a products liability case. And I have in essence ruled that the — there is no proof to the contrary that the danger relating to these gears is open and obvious. therefore, I have sustained the defendant's motion for judgment as a matter of law.

Accordingly, there will be no decision for you to render relative to this case. You're fully and finally discharged. Your warrants for your jury service will be mailed to you. I thank you for your service. You may go.

(Jury out.)

THE COURT: Mr. Edmond, Mr. Jones, Mr. Harmon, you understand that this court is not the final authority. You have the right to appeal this case to the Fifth Circuit Court of Appeals.

MR. JONES: Yes , sir, we understand.

(2)
FILED
941370 MAR 2 1995
No. 93-7162 OFFICE OF THE CLERK

In The

# Supreme Court of the United States

October Term, 1994

JIM EDMOND,

*Petitioner,*

v.

NEWMAN WHITNEY, A DIVISION OF NEWMAN MACHINE COMPANY, INC. AND MEMPHIS MACHINERY AND SUPPLY CO., INC.,

*Respondents.*

**Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## RESPONDENT NEWMAN WHITNEY, A DIVISION OF NEWMAN MACHINE COMPANY, INC.'S BRIEF IN OPPOSITION

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## QUESTION PRESENTED

1. Whether the finding by the Court of Appeals that the Plaintiff/Petitioner failed to meet his burden of proof is the type of case which warrants review by this Court?

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TO THE HONORABLE SUPREME COURT:

The respondent, Newman Whitney, a division of Newman Machine Company, Inc., through its counsel of record, respectfully requests that this Court deny the Petition for a Writ of Certiorari filed by the Petitioner, Jim Edmond.

## OPINIONS BELOW

In addition to the opinion of the United States Court of Appeals for the Fifth Circuit Affirming the Judgments As a Matter of Law in favor of the Defendants entered by the United States District Court for the Northern District of Mississippi which are reproduced in the Appendix to the Petition for Certiorari, the United States District Court for the Northern District of Mississippi entered a Memorandum Opinion holding in abeyance Edmond's Rule 60(b) Motion for Relief from Judgment pending resolution of the appeal to the Fifth Circuit Court of Appeals and issuance of a mandate. The Memorandum Opinion is reproduced as an Appendix to this Brief.

## STATEMENT OF THE CASE

In 1989, Jim Edmond ("Edmond") filed a products liability action against Newman Whitney, a division of Newman Machine Company, Inc. ("Newman") in the United States District Court for the Northern District of Mississippi. On December 8, 1992, after considering all of the evidence and all inferences in a light most favorable

to Edmond (Petitioner's App. A-13), the District Court granted Newman's Motion for Judgment as a Matter of Law (Petitioner's App. A-15).

While Edmond's appeal to the Fifth Circuit Court of Appeals was pending, Edmond filed a Motion for Relief from Judgment pursuant to Federal Rule of Civil Procedure 60(b). In the Memorandum Opinion holding the Rule 60(b) motion in abeyance pending resolution of the appeal by the Fifth Circuit and issuance of a mandate, the District Court, while noting that the basis for Edmond's Rule 60(b) motion was the pronouncement on Mississippi products liability law as expressed by the Mississippi Supreme Court in *Sperry-New Holland v. Prestage*, 617 So.2d 248 (Miss. 1993), stated the application of products liability law was not the sole basis for rendering judgment as a matter of law and reiterated the Court's prior ruling that the plaintiff failed to carry his case on the element of causation. (Respondent's App. A-5).

The Court of Appeals, after considering the briefs, reviewing the record and hearing oral argument, found the District Court's Grants of Judgment as a Matter of Law were free of reversible error. The Court of Appeals went on to hold that, regardless of the reasons assigned by the District Court, Edmond's inability to adduce any competent evidence that his injury was proximately caused by a defect in the design or manufacture of the machine in which his injury was sustained doomed his ability to recover and that failing to supply the necessary nexus between a defect in the machine and the proximate cause of the injury, Edmond simply failed to meet his burden of proof. (Petitioner's App. A-3-4).

## SUMMARY OF THE ARGUMENT

The grant of a Writ of Certiorari is inappropriate when the only question to be presented for review is whether the plaintiff adduced enough evidence to establish proximate cause.

---

## ARGUMENT

### I.

### THE GRANT OF A WRIT OF CERTIORARI IS INAPPROPRIATE WHEN THE ONLY QUESTION TO BE PRESENTED FOR REVIEW IS WHETHER THE PLAINTIFF ADDUCED ENOUGH EVIDENCE TO ESTABLISH PROXIMATE CAUSE.

Following a full trial on the merits, the District Court found as a matter of law that Edmond, who rested his case in chief without testifying as to how the injury occurred to his hand, failed to carry his case on the element of causation. (Respondent's App. A-5). On appeal, the Fifth Circuit reviewed the record and concluded:

> " . . . Edmond's inability to adduce any competent evidence that his injury was proximately caused by a defect in the design or manufacture of the machine in which his injury was sustained doomed his ability to recover. Edmond did not, presumably because he could not, testify as to the proximate cause of his accident; and the evidence he adduced – including, without limitation, his expert's testimony – did nothing to supply the necessary nexus between a

> defect in the machine and the proximate cause of the injury.
>
> Absent that, Edmond simply failed to meet his burden of proof . . . " (Petitioner's App. A-4).

The United States Supreme Court is not the place to review a conflict of the evidence nor to reverse a Court of Appeals because were the Supreme Court in its place, it would find the record tilting one way rather than the other. *NLRB v. Pittsburgh Steam Ship Co.*, 340 U.S. 498, 503, 71 S.Ct. 453, 945 L.Ed. 479 (1951).

Contrary to the petitioner's assertion that the Court of Appeals' decision is in direct conflict with the Mississippi Supreme Court, it is clear from the opinion (Petitioner's App. A-3-4) that the appellate court found it unnecessary to consider Mississippi products liability law because the plaintiff failed to establish proximate cause and thus failed to meet his burden of proof. The granting of a Writ of Certiorari is not warranted merely to review the evidence or inferences drawn from it. *General Talking Pictures Corporation v. Western Electric Company, Inc.*, 304 U.S. 175, 178-179, 58 S.Ct. 849, 851, 82 L.Ed.2d 1273 (1938).

Finally, this does not represent a case in which a decision of a United States Court of Appeals is in conflict with a decision of another United States Court of Appeals on the same matter nor has the Court of Appeals decided a federal question in a way in conflict with a state court of last resort; and, lastly, there is absolutely nothing to suggest that the Court of Appeals so far departed from the accepted and usual course of judicial proceedings, or sanctions such a departure by a lower court, as to call for

an exercise of this Court's power of supervision. Rule 10.1.(a), Supreme Court Rules.

## CONCLUSION

Edmond's Petition is nothing more than a request that this Court review the record and determine that his evidence was sufficient to establish proximate cause, and, as such, should be denied.

DATED: March 2, 1995

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

JIM EDMOND AND LIBERTY MUTUAL INSURANCE COMPANY — Plaintiff

LIBERTY MUTUAL INSURANCE COMPANY — Intervenor

v. — No. EC89-321-D-D

NEWMAN-WHITNEY, A DIVISION OF NEWMAN MACHINE COMPANY, INC., ET AL — Defendant

## MEMORANDUM OPINION

(Filed Feb. 22, 1994)

Final judgment and Order granting judgment as a matter of law was entered on December 8, 1992 in the above styled cause. A motion for new trial was denied on February 3, 1993. A notice of appeal to the Fifth Circuit Court of Appeal was filed on March 4, 1993. The court has been advised by the parties that the appeal before the Fifth Circuit is moving forward in due course with appellant's brief having been filed and brief from the appellee due soon. Upon review of the pending motions on the court's docket, the undersigned notes that despite the appeal plaintiff returned to this court on June 8, 1993, and filed a motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b). The basis for the Rule 60(b) motion is found in the change in Mississippi products liability law as expressed by the Mississippi Supreme Court in *Sperry-New Holland v. Prestage,* 617 So. 2d 248 (Miss. 1993). The undersigned has addressed, at length,

the Pestage decision and its impact on Mississippi products liability cases. For a full discussion, see *Batts v. Tow-Motor Forklift, Co., et al,* No. DC88-71-D-D, February 8, 1994, (Davidson, J.), designated by the undersigned for publication by West Publishing Company in Federal Supplement.

Of course, the traditional rule of procedure is that the district court is divested of jurisdiction upon the filing of the notice of appeal. Citing *Lairsey v. Advance Abrasives Co.*, 542 F.2d 928 (5th Cir. 1976), movant argues that the district court can indicate to the appellate court if it is inclined to grant the Rule 60(b) motion, thus allowing the movant/appellant to seek a remand from the appellate court to the district court where the motion is pending.[1] *Moore's Federal Practice* contains an excellent summary of the proper procedure that the district court should follow in such instances.

> The traditional rule is that when an appeal is taken from the district court, the latter court is divested of jurisdiction except to take action in aid of the appeal until the case is remanded to it by the appellate court. As a result, the district court is without power to *grant* relief under Rule 60(b), whether the motion is made prior to or after the appeal is taken, except with permission of the appellate court.
>
> Some circuits that have adhered to the traditional rule have required appellate court permission for the district court to *entertain* a Rule 60(b) motion. These are the Third, Tenth, and

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[1] *See Ingraham v. United States*, 808 F.2d 1075, 1081 (5th Cir. 1987) (indicating approval of the approach outlined in *Lairsey*).

Second, Circuits, although cases in the latter two circuits have not been completely uniform. It has been held that the appellate court will grant such permission, i.e., a remand, only if there is a reasonable showing that if leave is given, the trial court might properly grant the Rule 60(b) motion. Also it has been held that the traditional rule will not bar a district court from hearing the motion when the appeal is not yet docketed in the appellate court. Many circuits, cognizant of the time and expense involved in seeking relief in the appellate court have, on the basis of the district court's jurisdiction to act in aid of an appeal departed somewhat from the traditional rule and held that the district court, without appellate court permission, has the power to both *consider,* and *deny* Rule 60(b) motions. However, these circuits also take the position that if the district court indicates it is inclined to *grant* the motion, remand must be sought and obtained before the district court can take such action. Cases in the First, Fifth, Sixth, Seventh, Eighth, Tenth, and District of Columbia Circuits support this position. This procedure is also endorsed in some Second Circuit cases, although that circuit adheres to the traditional jurisdictional rule.

The Ninth Circuit, which adheres to the view that the filing of a notice of appeal divests the district court of jurisdiction to dispose of the motion without a remand from the court of appeals, has in the past followed different procedures. Some of its cases have required movants to file the 60(b) motion in the district court asking if that court would *grant* the motion, while others have directed that parties apply for an order indicating that the district

> court would *entertain* such a motion. However, the procedure appears to have unified with the requirement that movants ask the district to indicate if it wishes to entertain the motion or to grant it, and then, if appropriate, move the appellate court for a remand.

7 *Moore's Federal Practice,* para. 60.30[2] (2d ed. 1993).

Consistent with the procedure discussed in *Moore's,* this court's research reveals that the district court may consider a Rule 60(b) motion while an appeal is pending, *if certain steps are taken to preserve judicial resources of both the trial and the appellate court.* If the district court is inclined to grant the requested relief sought in the Rule 60(b) motion, a remand or "other permission" must be obtained from the appellate court. *Brown v. United Insurance Company of America,* 807 F.2d 1239, 1241-42 n.1 (5th Cir. 1987); *Alvestad v. Monsanto Co.,* 671 F.2d 908, 911 n.2 (5th Cir. 1982); *United States v. Hitchmon,* 602 F.2d 689, 692 (5th Cir. 1979); *Lairsey v. Advance Abrasives Co.,* 542 F.2d 928, 932 (5th Cir. 1976); *Dow Chemical, USA v. Consumer Product Safety Commission,* 464 F. Supp. 904, 906 (W.D. La. 1979). To this end, it is incumbent upon the movant/appellant to notify the appellate court that a rule 60(b) motion is pending in the trial court and request that no action be taken on the appeal pending disposition of the motion by the court below. *Dow Chemical,* 464 F. Supp. at 906 n.2. In such cases, the appellate court can "routinely stay" the appeal. *Id.*

However, in the case *sub judice,* the appellant has informed the district court that he has taken no steps to apprise the appellate court that he has a Rule 60(b) motion pending in this court. Furthermore, the district

court expresses no inclination at this time to grant the Rule 60(b) motion on the merits. While the undersigned has addressed the change in Mississippi's products liability law in its opinion in *Batts, supra,* that issue was *not* the sole basis for rendering judgment as a matter of law. The trial of this products liability case in this court was somewhat unique. Plaintiff rested his case-in-chief without testifying as to how the injury occurred to his hand. Instead, plaintiff relied upon a *res ipsa loquitur* theory of causation. Pursuant to *Edwards v. Sears, Roebuck and Company,* 512 F.2d 276, 287 (5th Cir. 1975), the court ruled, in addition to the "open and obvious" bar, that plaintiff had failed to carry his case on the element of causation. The plaintiff argues that for a strict liability case, causation need not be proved.

In a strict liability case, plaintiff is relieved of the burden of proving fault, which is supplied as a matter of law. *Toliver v. General Motors,* 482 So. 2d 213, 215 (Miss. 1986); *State Stove Manufacturing Co. v. Hodges,* 189 So. 2d 113, 119 (Miss. 1966). In this sense, "fault" consists of the "duty, breach" elements of a traditional negligence action. Whether or not plaintiff can rely upon a *res ipsa loquitur* concept to show how the injury occurred remains a viable, active issue for appellate review.

Therefore, for the reasons stated herein, the district court is of the opinion that the appeal to the Fifth Circuit Court of Appeals should proceed. Despite the recent developments in Mississippi products liability law which affect this case, another justiciable, outcome-determinative issue remains in the case. This issue is ripe for appellate review. Obviously, plaintiff's Rule 60(b) motion will be

held in abeyance pending resolution of the appeal and issuance of a mandate.

SO ORDERED.

THIS 22nd day of February, 1994.

/s/ Glen H. Davidson
United States
District Judge